

was not plainly and conspicuously marked on the outside of the package since the quantity stated was not correct.

On June 24, 1936, no claimant having appeared, judgment of condemnation was entered and it was ordered that the product be delivered to charitable institutions.

W. R. GREGG, *Acting Secretary of Agriculture.*

26099. Adulteration of crab meat. U. S. v. 296 Tins and 116 Tins of Crab Meat. Consent decree of forfeiture and destruction. (F. & D. no. 37753. Sample nos. 64228-B, 64231-B.)

This case involved a shipment of crab meat that contained fecal *Bacillus coli*.

On May 19, 1936, the United States attorney for the Southern District of Georgia, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 412 tins of crab meat at Savannah, Ga., alleging that the article had been shipped in interstate commerce on or about May 14, 1936, by J. S. Graves, from Bluffton, S. C., and charging adulteration in violation of the Food and Drugs Act.

The article was alleged to be adulterated in that it consisted in whole or in part of a filthy animal substance.

On May 22, 1936, L. P. Maggioni & Co., Savannah, Ga., having appeared and claimed ownership and having consented to the destruction of the product, judgment was entered ordering that it be forfeited and destroyed.

W. R. GREGG, *Acting Secretary of Agriculture.*

26100. Adulteration of vinegar. U. S. v. Herbert D. Hollwedel. Plea of guilty. Fine, \$200. Payment suspended and defendant placed on probation. (F. & D. no. 31498. Sample nos. 8945-A, 21762-A.)

This case involved an interstate shipment of vinegar that contained arsenic in an amount that might have rendered it injurious to health.

On July 23, 1934, the United States attorney for the Western District of New York, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Herbert D. Hollwedel, trading as H. D. Hollwedel, Rochester, N. Y., charging shipment by said defendant in violation of the Food and Drugs Act on or about September 6, 1932, from the State of New York into the State of Pennsylvania of a quantity of vinegar that was adulterated. The article, contained in barrels, was labeled: "W. E. Mathes Vinegar Co. Pure Apple Cider Vinegar. Made From Fresh Apples Reduced To 4% Acidity 33 Gals. Albion, N. Y."

The article was alleged to be adulterated in that it contained an added poisonous and deleterious ingredient, arsenic, in an amount which might have rendered it injurious to health.

On August 21, 1936, the defendant entered a plea of guilty, and the court imposed a fine of \$200, suspended its payment, and placed the defendant on probation for 1 year.

W. R. GREGG, *Acting Secretary of Agriculture.*

26101. Alleged misbranding of salad oil. U. S. v. 52 Gallon Cans and 142 Gallon Cans of Salad Oil. Exceptions sustained and libels dismissed. (F. & D. nos. 34459, 34565. Sample nos. 21215-B, 21261-B.)

These cases involved a product which was sold as salad oil. Examination showed that it consisted of sunflower oil or an oil similar to sunflower oil, with some cottonseed oil present in one lot.

On or about December 6 and December 18, 1934, the United States attorney for the District of Connecticut, acting upon reports by the Secretary of Agriculture, filed in the district court libels praying seizure and condemnation of 52 gallon cans of salad oil at Hartford, Conn., and 142 gallon cans of salad oil at New Haven, Conn., alleging that the article had been shipped in interstate commerce in part on or about November 13, 1934, by A. Krasne, from New York, N. Y., and in part on or about November 22, 1934, by the Agash Refining Corporation, from Brooklyn, N. Y., and charging misbranding in violation of the Food and Drugs Act. The charges against the product appear in the opinion.

The Agash Refining Corporation intervened and filed exceptions to the libels. On April 10, 1935, the court handed down the following memorandum decision sustaining the exceptions:

THOMAS, *District Judge*: The Agash Refining Corporation of Brooklyn, New York, is the refiner and packer of the products involved in these proceedings, and by order of Court dated January 8th, 1935, was given leave to intervene.

Exceptions to the libels were filed on January 15, 1935, whereupon the libelant filed motions to dismiss the exceptions which are identical in both cases. As they were argued and briefed together they may be disposed of in a single memorandum.

In the first case, No. 3608, the libel charges that the intervenor's "Italian Cook Brand" container violates the Act of Congress approved June 30, 1906, commonly known as the Food and Drugs Act, U. S. C. A. Title 21, Section 1, particularly Section 8, general paragraph and paragraph second, in the case of food, U. S. C. A. Title 21, Sections 9 and 10, in that the statements and colors on the label are misleading and tend to deceive and mislead purchasers because they create the impression that the product is Italian olive oil, whereas it is not; in that the statement on the label, "Pure Vegetable Salad Oil", is misleading and tends to deceive the purchaser because this term may include olive oil; and in that it purports to be a foreign product when in fact it is not.

The libel in the second case, No. 3619, charges that the intervenor's Messina Brand product violates the same statute in that the statements on the label are misleading and tend to deceive and mislead the purchaser because they create the impression that the product is Italian Olive Oil when in fact it is not; and in that it purports to be a foreign product, which it is not.

At oral argument the intervenor presented, and by agreement of counsel there was admitted in evidence a can in each case bearing its respective label, which was offered for consideration by the Court.

The exceptions in each case attack the libels for failure to accurately describe the packages, and assert that the libels are insufficient in law because an examination of the container establishes, as a matter of law, that the package shows nothing which is either misleading or deceptive. The intervenor argues that all that appears on the container should be considered in reaching a conclusion and that a conclusion should not be based upon such excerpts from the container as have been recited in the libel. This argument is sound because it is only when taken as a whole—it is only when all that appears upon all sides of the container is considered that any safe or fair conclusion can be reached.

The claim made by the libelant that either one or both of these containers suggest a foreign origin is a far cry from the fact. With reference to this, Section 9 of the Statute provides that the term "misbranded" shall apply "to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced." It seems quite clear to me, after an examination of all the labels, that none of them fall within the condemnation of the statute. The Italian Cook Brand label is entirely English, except for one side panel upon which there is a statement as to the uses for the oil which is printed in Italian which is no more than a translation of the English upon the other side panel, both of which carry prominently the words, "Agash Refining Corp., Bush Terminal, Brooklyn, New York." There is nothing else upon the label having reference to place or origin. The appearance on the front and back panels of the can of three colored diagonal stripes of red, white, and green, as a background for the printed matter, lends no support to libelant's contention that because there are three vertical stripes of red, white, and green in the National Flag of Italy one must conclude that the oil within the container is a product of Italy. Looking at the container it is incredible that anyone of fair intelligence could be deceived into thinking that the product inside of it was manufactured or produced in Italy. On the contrary, it must appear to that same person of fair intelligence that the Agash Refining Corporation of Brooklyn, New York is its producer, and that it is a domestic article.

The Messina Brand Label. Nothing about this container suggests a foreign product. Both the front and back panels show clearly and distinctly the words "Made in U. S. A."

There only remains for decision the question of whether either label tends to create a belief in the mind of a purchaser that the product contained in the cans is olive oil. The printed legend describes the contents as "Pure Vegetable Salad Oil." That pure vegetable salad oil has been recognized by the Federal Specifications Board seems clear. In its pamphlet issued September 16, 1930, the Federal specification for "Oil; Vegetable, Salad", specifies two types, to wit, type A which is "any edible vegetable Oil, excepting olive oil", and type B which is "any designated type of edible vegetable oil, excepting olive oil." It seems clear that the test requirements as above set forth are such as to show that olive oil could not qualify under the description of "vegetable salad oil"

by reason of the obvious characteristics of olive oil. The second edition of Webster's New International Dictionary, published in 1934, defines "salad oil" as "an oil for salad dressing, specifically in trade any edible oil other than olive oil, as cottonseed, corn, or peanut oil." Adopting the principle that courts may judicially notice much which they cannot be required to notice it may be observed that in advertising these oils tradesmen invariably describe "olive oil" as "olive oil" and all other oils as "salad oils." Furthermore, while technically olive oil may be classed as a vegetable oil by way of distinguishing it from animal or mineral oils, by common understanding as well as by dictionary definition, olive oil is a fruit oil since the olive is defined as a fruit of the olive tree and olive oil as "oil expressed from the ripe fruit of the olive"; whereas the other oils commonly known as "salad oils" are strictly vegetable oils, as the word "vegetable" is commonly understood.

There is nothing in the case of *U. S. v. 95 Barrels of Vinegar*, (265 U. S. 438) which lends support to the contention of the Government in this case. There it was found as a fact that the product labeled "Apple Cider Vinegar made from selected apples" was not in fact apple cider vinegar as that term was generally understood.

In the case at bar the intervenor's product is concededly vegetable salad oil and in my opinion does not even tend to mislead or deceive "the purchaser", who, in the case of a sale at retail, would be one of the general public not necessarily informed as to the trade meaning of words, into believing that the product is, as a matter of fact, olive oil. Regardless of what the understanding may have been many years ago when about the only salad oil commonly known was olive oil, to-day with great advances made over the old days the words "salad oil" and "olive oil" are everywhere recognized as being distinctly different products. To-day it can hardly be claimed that there is confusion even, much less deceit, in the use of the words "salad oil" and "olive oil." They are recognized as two separate articles. The words on the can "Pure Vegetable Salad Oil" cannot possibly be understood to mean olive oil or lead one to believe that he is purchasing olive oil.

While it is true that the only evidence we have here is the pleadings, including the exceptions which stand admitted on the motion to dismiss, together with the cans with the labels upon them, I am of the opinion that the application of the doctrine of judicial notice, referred to supra, is ample justification for the conclusions herein reached. Amplification of the doctrine may be found in Wigmore on Evidence, 2nd Ed., Vol. 5, sec. 2583. Hence I hold that the instant case does not fall within the cases cited and relied upon by the libellant of which *Von Bremen et al. v. United States* (192 Fed. 904) is an example. In that case, and others of similar import, the prosecutions were by the United States on criminal information. Here we have proceedings in rem by way of libel for condemnation where the goods have been seized and are now in the custody of the Marshal.

It follows, therefore, that the motions to dismiss are both denied, the exceptions in both cases are sustained, the attachments vacated, and the property seized by the Marshal should be returned.

Submit decree accordingly properly consented to as to form.

On April 23, 1935, judgments were entered sustaining intervenor's exceptions and ordering that the libels be dismissed and the product returned.

W. R. GREGG, *Acting Secretary of Agriculture.*

26102. Alleged misbranding of salad oil. U. S. v. 397, 62, and 76 Cases of Salad Oil. Libel dismissed. (F. & D. no. 34424. Sample nos. 17124-B, 17125-B, 17126-B.)

This case involved a product sold as salad oil which was found to consist of oil other than olive oil, probably corn oil.

On November 21, 1934, the United States attorney for the District of New Jersey, acting upon a report by the Secretary of Agriculture, filed in the district court a libel praying seizure and condemnation of 535 gallon, half-gallon, and quart cans of salad oil at Newark, N. J., alleging that the article had been shipped in interstate commerce on or about October 1, October 20, and October 24, 1934, by the Agash Refining Corporation, from Brooklyn, N. Y., and charging misbranding in violation of the Food and Drugs Act.

The article was alleged to be misbranded in that the use of the Italian national colors, together with the following statements appearing on the label, (prominent brand name on main panels) "Italian cook", (designation on side panels) "Italian Cook Oil", (on one side panel) "Per Insalate * * * ha qual